

APPEAL NO. 022270
FILED OCTOBER 28, 2002

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on August 8, 2002. With respect to the issues before her, the hearing officer determined that the appellant (claimant) reached maximum medical improvement (MMI) on April 9, 2002, with an impairment rating (IR) of 0% as certified by the designated doctor in his amended Report of Medical Evaluation (TWCC-69). In her appeal, the claimant argues that the hearing officer erred in giving presumptive weight to the designated doctor's amended report. The appeal file does not contain a response to the claimant's appeal from the respondent (carrier).

DECISION

Affirmed in part and reversed and rendered in part.

The parties stipulated that the claimant sustained a compensable low back injury on _____. On April 9, 2002, Dr. JW, the designated doctor selected by the Texas Workers' Compensation Commission (Commission), examined the claimant. In a TWCC-69 of the same date, Dr. JW certified that the claimant reached MMI on April 9, 2002, with an IR of 14%, which was assigned for loss of lumbar range of motion (ROM). In the narrative report accompanying his TWCC-69, the designated doctor noted that the claimant's medical records suggested evidence of symptom magnification; thus, he requested a psychological evaluation because he believed it was necessary to have such an evaluation in order to determine her IR. Specifically, the designated doctor stated "[m]y overall impression is that the physical exam, the diagnostic testing . . . and the results of the [IR] are not consistent with any underlying pathology. With these doubts, psychological evaluation is required to sort out these problems." In an undated addendum to his narrative report, the designated doctor noted that the claimant did not attend that psychological evaluation he had scheduled for her and concluded:

[b]ecause of our strong suspicion of malingering, and [claimant's] avoidance [of a] psychological evaluation, we can only assume that this assumption is to some degree correct; therefore, we cannot within the confidence accept the whole person impairment determined above. Without a basis for determining actual impairment, we assign a whole person impairment of 0 percent.

On April 25, 2002, the claimant underwent a rescheduled psychological assessment with Dr. R. In his report, Dr. R stated:

the patient fulfills criterion for somatization disorder. This suggests that [claimant] does not recognize her pain

symptoms as symptoms for secondary gain or malingering. There is a clear pattern of symptom magnification, lack of response to treatments, inconsistent effort, that are probably due to severe psychopathology, notable psychosocial stress, significant cognitive impairment and the tendency to express psychological pain in a somatic fashion. Thus, while there is little to no conscious motivation for her symptoms to satisfy external incentives (such as malingering), there is significant psychological overlay that will affect the severity, duration, maintenance, and exacerbation of her current pain condition.

The designated doctor received Dr. R's report and on May 3, 2002, he filed an amended TWCC-69, continuing to certify an MMI date of April 9, 2002, and assigning an IR of 0%. In the narrative accompanying his amended TWCC-69, the designated doctor noted that Dr. R had determined that the claimant was not a malingerer but had diagnosed the claimant with somatization disorder with major depressive disorder, that Dr. R indicated that while the claimant's psychological problems "may have been exacerbated by the work injury, they were not caused by the work injury," and that there is "substantial functional overlay due to these premorbid factors." The designated doctor concluded

[t]herefore it is impossible for us to be correct, medically, assigning the measured impairments to her work-related injury, and therefore, her final whole person [IR] must be zero.

We will submit the [ROM] impairment also for Hearing Officer consideration, in case it is decided that the psychological information either cannot be taken into account, or that I have incorrectly come to this conclusion.

The Commission sent a letter from the treating doctor to the designated doctor and asked him to review it and determine whether it changed his opinion. On July 11, 2002, the designated doctor responded, as follows:

To review, the 14 percent was based on her physical impairment as measured on that day, but I suspected at the time that her apparent lack of maximum effort was based on underlying psychological factors, which could be directly related to her injury or be premorbid. If the physical or psychological pathology were indeed a direct result of her worked [sic] related injury, then she would deserve the 14 percent whole person [IR]. But the psychological evaluation (see report by [Dr. R]; already submitted) identified premorbid psychological disease, i.e. Somatization Disorder and Major Depression. Therefore, the physical impairment

would then have to be zero percent whole person impairment. [Emphasis in original.]

The hearing officer determined that the great weight of the other medical evidence was not contrary to the designated doctor's report; thus, she afforded the designated doctor's report presumptive weight and determined that the claimant reached MMI on April 9, 2002, with an IR of 0%. We believe that the hearing officer erred in so doing. As the claimant's attorney noted, the designated doctor measured valid lumbar ROM impairment at his examination of the claimant; however, he suspected symptom magnification. Thus, he requested and obtained a psychological evaluation of the claimant. That examination revealed that the claimant was not a malingerer, but rather, she had somatization disorder and significant psychological overlay. Upon receiving the psychological assessment, the designated doctor noted that while the claimant's psychological problems "may have been exacerbated by the work injury, they were not caused by the work injury." As such, he determined that he could not correctly assign the measured impairments to the claimant's work-related injury and he assessed a 0% IR. The claimant's attorney cites Texas Workers' Compensation Commission Appeal No. 000064, decided February 22, 2000, as controlling here. Appeal No. 000064 concluded that the hearing officer did not err in determining that the claimant's IR was 20% based on the measured ROM deficits rather than the lower figure recommended by a peer review doctor who noted that the claimant's degenerative condition contributed to his diminished ROM. Appeal No. 000064 concluded that the "hearing officer certainly did not err in considering the claimant's current impairment, rather than what he might have been rated were he a different person." In so doing, Appeal No. 000064 relied on three propositions in support of the ultimate conclusion namely, that an employer accepts the employee as she is when she enters employment; that although a preexisting infirmity may cause an incident to cause an injury where an injury would not have occurred in an employee who did not have the preexisting infirmity, the predisposing bodily infirmity does not preclude compensation; and that the compensable injury includes the enhanced effects resulting from the predisposing infirmity. In this instance, it is apparent that the claimant's underlying psychological problems resulted in enhanced effects from the compensable injury. However, under the reasoning of Appeal No. 000064, it was improper for the designated doctor to consider that in amending his report and reducing that claimant's IR from a 14% to a 0%. The claimant's measured ROM deficits were the result of her condition as it actually existed at the time of the designated doctor's evaluation and, accordingly, it is proper to assess an IR based upon her actual condition, including the psychological overlay aspect, rather than giving her a 0% IR simply because not all of the impairment was directly attributable to the claimant's physical injury. Accordingly, we reverse the determination that the claimant's IR is 0% and render a new determination that the claimant's IR is 14%, as certified by the designated doctor in his initial report. Finally, we note that the claimant's ROM measurements met the consistency requirements of the Guides to the Evaluation of Permanent Impairment, fourth edition (4th printing dated October 1999) (AMA Guides), which provides that "reproducibility of a patient's performance is one indicator of an optimum effort." AMA Guides p. 112. Thus, it would seem that the claimant satisfied the requirement established in the AMA Guides to test

for inconsistency of effort and, as such, she was properly assigned a rating for demonstrated loss of ROM.

The hearing officer's determination that the claimant reached MMI on April 9, 2002, as certified by the designated doctor, is affirmed. The determination that the claimant's IR is 0% is reversed and a new decision rendered that the claimant's IR is 14% as the designated doctor certified in his initial report.

The true corporate name of the insurance carrier is **AMERICAN HOME ASSURANCE COMPANY** and the name and address of its registered agent for service of process is

**CORPORATION SERVICE COMPANY
800 BRAZOS, SUITE 750, COMMODORE 1
AUSTIN, TEXAS 78701.**

Elaine M. Chaney
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Thomas A. Knapp
Appeals Judge